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Application No.: 10/600,774

Inventor(s): Feller et al.

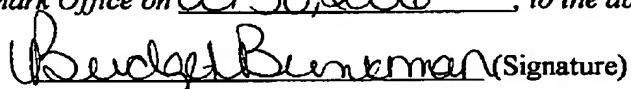
Filed: June 20, 2003

Docket No.: 9281

Confirmation No.: 5936

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/600,774
Inventor(s) : Feller et al
Filed : June 20, 2003
Art Unit : 3761
Examiner : Melanie Jo Hand
Docket No. : 9281
Confirmation No. : 5936
Customer No. : 27752
Title : SANITARY NAPKIN FOR CLEAN BODY BENEFIT

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

This Brief is filed pursuant to the appeal from the decision communicated in the Office Action mailed on of May 30, 2006 and the Advisory Action mailed September 29, 2006.

A timely Notice of Appeal was filed on August 30, 2006.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1-17 and 19-20 are rejected in the present application and are appealed.

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

Claims 2, 3, 7, 8, 12-14, and 17-20 have been cancelled.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

STATUS OF AMENDMENTS

Amendment was filed on August 30, 2006. No boxes were checked in Section 3 or 7 of the Advisory Action. Therefore, that status of the amendment of August 30 is not known, and the instant Appeal Brief is filed as if the amendment was NOT entered.

SUMMARY OF CLAIMED SUBJECT MATTER

An absorbent article (such as a catamenial device as shown in Figures 1 and 2) is claimed. The catamenial device can be a sanitary napkin, and devices worn in a similar manner. (Page 1, lines 11-15). For all such devices, comfort is a high priority. (Page 1, line 21). Comfort can be improved by designing the device to have improved body fit. Such body fit and comfort is achieved in the present invention by a combination of materials having specific properties with respect to one another. (See, Claims).

Specifically, the claimed absorbent article comprises a fluid permeable facing layer (21) having a first elastic modulus and an absorbent core (24) joined to the facing layer (21), the absorbent core having a second elastic modulus. The facing layer (21) is joined to the absorbent core (24) at substantially the entirety of their respective interfacial surfaces. A fluid impermeable backsheet (22) is joined to the facing layer (22). At equal strain from about 1% to about 5% the first elastic modulus is greater than the second elastic modulus.

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

I. Claims 2, 12 and 13 have been rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter.

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

II. Claims 1, 2, 4-6, 8, 12-14, 17 and 20 have been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155).

III. Claim 3 has been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155) and further in view of Hammons (U.S. 2003/0004484).

IV. Claim 5 has been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155) and further in view of Mackey et al. (U.S. Patent No. 4,986,882).

V. Claims 9-11 and 19 have been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155) and further in view of Cinelli et al. (U.S. 2002/0013565).

VI. Claims 15 and 20 have been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155) and further in view of Ohashi et al. (2002/0065498).

ARGUMENTS

Arguments in numbered sections below are made regarding each of the numbered Grounds of Rejection listed above. However, before listing detailed reasons for each claim rejection, Appellants respectfully submit the following general statement common to all arguments below. Appellants believe this general statement will assist the Board of Appeal in reaching its decision on appeal.

General Statement:

The claimed invention is directed to a structure and materials for an absorbent article to be worn against the body. Absorbent articles in general are well known in the art and include such devices as disposable diapers and sanitary napkins. The prior art for

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

materials utilized in the construction of absorbent articles is well developed and, to Appellant's knowledge, has never included the art of lithographic printing plates.

Each of the 35 USC §103 rejections are based on a combination of a proper reference and one plainly non-analogous reference: Bhambra, US 6,786,155. Bhambra is directed to photo paper, and discloses things like printing forms, electronic parts and masks for photographic technologies (See, Abstract, column 1, lines 8-11. See also, US Cl. 101/460 – lithographic printing plates including paper or cellulosic support having printing or non-printing surface). Appellants respectfully submit (and argued in our August 30 Response) that such a combination is improper on its face; there is no conceivable nexus between Bhambra and Weisman, for example.

In the Advisory Action of September 29, 2006, the Examiner responded:

"[t]he motivation to combine the prior art of Weisman and Bhambra is that Bhambra is providing an equally comfortable and stronger lining layer material that would enhance the lining layer of Weisman." (Advisory Action, continuation sheet, lines 2-4).

Appellants respectfully submit that this statement is factually incorrect and legally insufficient. First, Bhambra is not disclosing a lining material for an absorbent article, and discloses absolutely nothing about comfort. There is nothing in Bhambra that does, or could be expected to, mention or suggest any "lining layer" or other material for use in an absorbent article. Additionally, there is nothing in Bhambra that does, or could be expected to, mention or suggest comfort. Bhambra is directed to an "imaged member", e.g., photographic paper, manufactured from an imaged member precursor. The precursor web can be a precursor to a lithographic printing form, or to a printed circuit board. (See, column 4, lines 16-21). There is nothing "equally comfortable" about photographic paper or a printed circuit board in relation to the claimed facing layer of an absorbent article, which can be worn in the crotch area of a wearer. Appellants can find no discernable basis for such a statement, and respectfully request that the Board of Appeal consider carefully the applicability of such a reference in the instant rejections.

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

Second, the statement is legally insufficient to support a *prima facie* rejection under 35 USC §103. The claimed invention is not directed to “providing an equally comfortable and stronger lining layer material that would enhance the lining layer” of anything. As clearly claimed in Claim 1, the invention is directed, in part, to a “facing layer” and an “absorbent core”, each having certain modulus properties. There is nothing in the claim that requires a “lining material” to “enhance” another “lining layer”. Therefore, the rejection fails to address the claimed subject matter, rendering it insufficient as failing to meet the standard for making out a *prima facie* case of obviousness. This insufficiency is general, and extends to all the instant 35 USC §103 rejections.

Accordingly, Appellants respectfully request the Appeal Board to consider as an initial matter the general applicability of Bhambra in the rejections below. Bhambra is directed to non-analogous art, classified in a totally different art area, and offers absolutely no disclosure that would attract the attention of the skilled person working on absorbent articles. Even if a person skilled in the art of absorbent articles came across Bhambra, there is nothing in Bhambra that would indicate to such a skilled person that the photo paper or electronic printed circuit board material of Bhambra could be modified, combined, or otherwise reapplied with any benefit in an absorbent article.

I. Claims 2, 12 and 13 have been rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter.

Claims 2, 12 and 13 have been rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter.

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

Claims 2, 12, and 13 have been cancelled in a good faith effort at putting the amended claims in a form for allowance. Appellants respectfully submit the 35 USC §112 rejection of Claims 2, 12, and 13 is moot.

II. Claims 1, 2, 4-6, 8, 12-14, 17 and 20 have been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155).

Claims 1, 2, 4-6, 8, 12-14, 17 and 20 have been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155).

Claims 2, 3, 7, 8, 12-14, and 17-20 have been cancelled in a good faith effort at putting the amended claims in a form for allowance.

The instant rejection of claims 1 and 4-6 under 35 U.S.C. §103 must comport with the standard set forth in *Graham v. John Deere Company* 383 US1, 148 USPQ 459 (1966), explained in MPEP Section 706. Moreover, MPEP Section 2143 outlines the Supreme Court's guidance in that landmark case, and requires that, to establish a *prima facie* case of obviousness, the USPTO must not only identify each claim element in the cited reference, but must also set forth some suggestion or motivation to modify the reference. Therefore, the Office Action must:

- (1) Set forth the differences in the claims over the applied references;
- (2) Set forth the proposed modification of the references which would be necessary to arrive at the claimed subject matter; and
- (3) Explain why the proposed modification would be obvious.

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

To satisfy Step (3), the Patent Office must identify where the prior art provides a motivating suggestion to make the modification proposed in Step (2). See *In re Jones*, 958 F2d 347, 21USPQ 2d 1941(Fed. Cir. 1992). The mere fact that the prior art may be modified as suggested by the Patent Office does not make the modification obvious unless the prior art suggests the desirability of the modification. See *In re Fritch*, 922 F2d 1260, 23 USPQ 2d 1780 (Fed. Cir. 1992).

Appellants show below that the current Office Actions failed to establish a *prima facie* case of obviousness by failing on at least one of points 1-3 in the Supreme Court's *Graham* requirements shown above.

Accordingly, the arguments below will address each claim in light of the Supreme Court's *Graham* requirements.

The Office Action fails to make a *prima facie* case of obviousness for Claim 1

1. With respect to the first of the *Graham* factors, the Office Action fails to state where in Weisman et al. is disclosed the following claimed elements:

- a. a fluid permeable facing layer [of the absorbent article, as disclosed in the instant application] having a first elastic modulus. (The "facing layer 61" identified by the Office Action is not a facing layer as disclosed in the instant invention.);
- b. an absorbent core joined to the facing layer ... at substantially the entirety of their respective interfacial surfaces. (The "absorbent core 65" identified by the Office Action is not joined to any facing layer; note that a "topsheet" is shown as optional for the embodiment of FIG. 5 identified by the Office Action, and the topsheet so disclosed does not meet this limitation.);

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

- c. a fluid impermeable backsheet joined to the facing layer. (The "outer layer 60" identified by the Office Action is not disclosed as being fluid impermeable.); and
- d. wherein at equal strain from about 1% to about 5% the first elastic modulus [of facing layer] is greater than the second elastic modulus [of absorbent core];

2. As can be seen in the list above, the Office Action is clearly mistaken in identifying only one of these elements as missing, i.e., first modulus for the ling layer 61.

3. Bhambra fails to remedy the deficiencies of Weisman in failing to teach, disclose, or otherwise suggest all the limitations of Claim 1 missing in Weisman.

5. Therefore, as an initial matter, it is absolutely impossible to make out a *prima facie* case of obviousness in accordance with MPEP 2143 because the references fail to teach or suggest all of the claim limitations. The teaching or suggestion must be found in the prior art, not in the appellant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). Appellants submit that there can be no possible motivation to combine non-existent claim elements to achieve the claimed invention.

7. The Office Action provides no explanation as to why the necessary modifications would be obvious. In particular, the Office Action provides no reason why the person skilled in the art of making absorbent articles would have the slightest inclination to use the article of Bhambra, which relates to "printing forms, electronic parts and masks" (Field of the Invention). There is absolutely no nexus between the two references, and there is reason to believe any combination between the two would result in any successful article, much less the claimed invention. The combination is purely arbitrary, based on impermissible hindsight.

8. Because the Office Action failed to set out the differences between the claimed invention and the prior art, as shown above, and because the indicated claimed elements are not disclosed or suggested in the cited references, and because there is no

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

(possible) suggestion or motivation to combine the (non-existent) elements of two references having no nexus to achieve the claimed invention, and because the Office Action provides no explanation as to why the necessary modifications based on two unrelated and unrelated references would be obvious, Appellants respectfully submit that the Office Action has failed to make out a *prima facie* case of obviousness under 35 USC 103(a).

9. Accordingly, Appellants respectfully request that the rejection of Claim 1 be withdrawn. Likewise, the Appellants respectfully request that the rejection of Claims 4-6, which depend from Claim 1, also be withdrawn.

III. Claim 3 has been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155) and further in view of Hammons (U.S. 2003/0004484).

Claim 3 has been cancelled in a good faith effort at putting the amended claims in a form for allowance. Appellants respectfully submit the 35 USC §103(a) rejection of Claim 3 is moot.

IV. Claim 5 has been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155) and further in view of Mackey et al. (U.S. Patent No. 4,986,882).

Claim 5 has been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155) and further in view of Mackey et al. (U.S. Patent No. 4,986,882).

For the reasons given above with respect to Claim 1, Appellants respectfully submit that Claim 5 is allowable over the cited references. The addition of Mackey to

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

make a three-way obviousness rejection adds nothing to remedy the deficiencies of Weisman and Bhambra alone.

Accordingly, Appellants respectfully request that the rejection of Claim 5 be withdrawn.

V. Claims 9-11 and 19 have been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155) and further in view of Cinelli et al. (U.S. 2002/0013565).

Claim 19 has been cancelled in a good faith effort at putting the amended claims in a form for allowance. Appellants respectfully submit the 35 USC §103(a) rejection of Claim 19 is moot.

For the reasons given above with respect to Claim 1, Appellants respectfully submit that Claims 9-11 are allowable over the cited references. The addition of Cinelli for any purported disclosure of a secondary topsheet to make a three-way obviousness rejection adds nothing to remedy the deficiencies of Weisman and Bhambra alone.

Accordingly, Appellants respectfully request that the rejection of Claims 9-11 be withdrawn.

VI. Claims 15 and 20 have been rejected under 35 U.S.C. §103(a) as obvious over Weisman et al. (U.S. Patent No. 4,865,596) in view of Bhambra (U.S. Patent No. 6,786,155) and further in view of Ohashi et al. (2002/0065498).

Claim 20 has been cancelled in a good faith effort at putting the amended claims in a form for allowance. Appellants respectfully submit the 35 USC §103(a) rejection of Claim 20 is moot.

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

For the reasons given above with respect to Claim 1, Appellants respectfully submit that Claim 15 is allowable over the cited references. The addition of Ohashi for any purported disclosure of a pair of "grooves 15" to make a three-way obviousness rejection adds nothing to remedy the deficiencies of Weisman and Bhambra alone.

Accordingly, Appellants respectfully request that the rejection of Claim 15 be withdrawn.

SUMMARY

In view of the foregoing, reconsideration of this application, entry of the amendments presented herein, and allowance of Claims 1, 4-6, 9-11, 15 and 16 is respectfully requested.

Respectfully submitted,
THE PROCTER & GAMBLE COMPANY



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Date: October 30, 2006

Customer No. 27752

(Appeal Brief.doc)
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Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

CLAIMS APPENDIX

1. (Previously presented) An absorbent article comprising,
 - a. a fluid permeable facing layer having a first elastic modulus;
 - b. an absorbent core joined to the facing layer, the absorbent core having a second elastic modulus;
 - c. wherein at equal strain from about 1% to about 5% the first elastic modulus is greater than the second elastic modulus and wherein the facing layer is joined to the absorbent core at substantially the entirety of their respective interfacial surfaces; and
 - d. a fluid impermeable backsheet joined to the facing layer.
2. (Cancelled)
3. (Cancelled)
4. (Original) The absorbent article of Claim 1, wherein the density of the absorbent core is between about 0.050 g/cm³ and about 0.15 g/cm³.
5. (Original) The absorbent article of Claim 1, wherein the facing layer has a caliper and the absorbent core has a second caliper, and wherein the ratio between the facing layer caliper and the absorbent core caliper is from about 1:3 to about 1:20.
6. (Original) The absorbent article of Claim 1, wherein the absorbent article is a catamenial device.
7. (Cancelled).
8. (Cancelled).
9. (Original) The absorbent article of Claim 1, wherein the facing layer comprises a topsheet and a secondary topsheet.

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

10. (Original) The absorbent article of Claim 9, wherein said topsheet is an apertured, formed film topsheet.
11. (Original) The absorbent article of Claim 9, wherein said secondary topsheet is a nonwoven web.
12. (Cancelled)
13. (Cancelled)
14. (Cancelled)
15. (Original) The absorbent article of Claim 1, further comprising a pair of deep-embossed channels, the channels defining an effective width.
16. (Original) The absorbent article of Claim 15, wherein said effective width is from about 20 mm to about 50 mm.
17. (Cancelled)
18. (Cancelled)
19. (Cancelled)
20. (Cancelled)

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

EVIDENCE APPENDIX

None

Appl. No. 10/600,774
Docket No. 9281
Appeal Brief dated October 30, 2006
Reply to Office Action mailed on May 30, 2006
Customer No. 27752

RELATED PROCEEDINGS APPENDIX

None